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ASSOCIATION
OF AMERICAN
RAILROADS

Michael J. Rush
Assistant General Solicitor

VIA MESSENGER

January 5, 1990

Dockets Unit
Research and Special Programs Admin.
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: Docket No. IRA-48

Dear Sirs:

The Association of American Railroads (AAR), a nonprofit trade association representing freight railroads, submits the following rebuttal comments in Docket No. IRA-48, 54 Fed. Reg. 37764, September 12, 1989. This proceeding concerns the inconsistency between federal hazardous materials laws and certain requirements of the State of Maine pertaining to the transportation of hazardous materials. The AAR previously submitted comments in this proceeding demonstrating that Maine's registration and fee requirements for railroads are inconsistent under §112 of the Hazardous Materials Transportation Act (HMTA). Comments disagreeing with the position taken by the AAR, in whole or in part, were submitted by Yellow Freight System, Inc., National Tank Truck Carriers Inc., (NTTC), and the State of Maine. These rebuttal comments refute the assertions made by Yellow Freight, NTTC, and Maine, insofar as they take issue with the AAR's comments.

Yellow Freight's Comments

The AAR, in its comments, noted that Maine's tonnage fee for railroads compares unfavorably with the low, flat annual fee imposed on motor vehicles. The AAR noted that if a tonnage tax was imposed on motor vehicles, the tax paid would be far in excess of the fifty dollar annual fee imposed on motor vehicles. As a result, Maine's tonnage fee could result in the diversion of traffic from railroads to motor carriers. See AAR's comments, pp. 5, 6.

Yellow Freight, on the other hand, complains that Maine's tonnage tax on railroads gives railroads a competitive

advantage, because if one truck transported only one ton of hazardous materials in Maine in a single year, it would have to pay a $25 fee, which amounts to $25 per ton: "While a truck pays a minimum of $25 to transport one ton of these hazardous materials in Maine, it only costs the railroads $3.75 to handle 25 tons." Yellow Freight's Comments, p. 2. Is Yellow Freight correct in arguing that trucks are taxed too much? Or is the AAR correct in its assertion that Maine's tonnage tax on railroads is disproportionately high?

The fallacy in Yellow Freight's argument is that Yellow Freight, as a less-than-truckload carrier, is analyzing the potential effects of Maine's fees and taxes on small shipments, while railroads are predominantly bulk carriers of the hazardous substances in question. For example, the railroads in Maine transport in significant quantities chlorine and sodium hydroxide, two substances which Maine asserts are taxable when transported by rail because they are listed pursuant to §313 of SARA (chlorine is also on the §302 list). These substances, when transported by rail, are transported in bulk in tank cars. The railroads' competitors for this traffic would be bulk motor carriers, not less-than-truckload carriers. The same can be said for virtually all of the hazardous substances and materials transported by rail. Insofar as bulk shipments are concerned, Maine's tonnage fee on railroads is much more substantial than the low, flat annual fee imposed on motor vehicles, as we showed in our previous comments in this proceeding.

NTTC's Comments

NTTC's comments are quite puzzling. NTTC states:

> Congress (despite amending Superfund) continues to compel the Secretary to consider "hazardous substances"--in transportation--to be "hazardous materials." NTTC believes that CERCLA, as amended, simply preempts the Secretary's options, here....
>
> In light of the above legislative reality, NTTC concludes that Maine's reliance on the "CERCLA List," as a basis for determining commodities to fall within its "application/fee" structure cannot be ruled "inconsistent," since it merely replicates a legislative directive to the Secretary.

NTTC's Comments, p. 2. We are not sure what point NTTC is attempting to make. NTTC seemingly is arguing that Congress has directed DOT to regulate the substances subject to Maine's fee. If so, NTTC is way off base. Congress has required DOT to regulate hazardous substances designated as such pursuant to

section 306 of CERCLA, 42 U.S.C. §306. Congress has not required DOT to regulate hazardous substances designated as such pursuant to sections 302 and 313 of SARA, 42 U.S.C. §§11002, 11023. It is these latter substances that are at issue here.

It also should be noted that even if DOT did regulate all of these substances, the Maine list of substances subject to its tax would be much smaller, and hence different, than the list of substances regulated as hazardous materials by RSPA. As we discussed at length in our earlier comments, pp. 2, 3, definitions of hazardous materials that differ from RSPA's are per se inconsistent. See, e.g., IR-19A, 53 Fed. Reg. 11600 (April 7, 1988) (a state cannot regulate subgroups of hazardous materials regulated by RSPA).

Maine's Comments

Maine reiterates what NTTC said about Congress requiring DOT to regulate CERCLA hazardous substances. Maine's Nov. 30 comments, p. 2. We have already addressed this issue.

The AAR in its earlier comments discussed the inconsistency between Maine's list of hazardous substances and RSPA's definition of hazardous materials. See AAR October 20 comments, pp. 2 and 3. Maine, in disagreeing with the AAR's position, states that "what is at issue here is not a transportation list devised by the State of Maine, but rather, a list of hazardous substances promulgated by the federal government through the Environmental Protection Agency." Maine's Nov. 30 comments, p. 4. Maine is correct in stating that its list of substances, which is a combination of the lists of substances derived from sections 302 and 313 of SARA, is not a transportation list, but a list of environmentally hazardous substances (used for the purpose of regulating fixed facilities). Unfortunately, Maine is using this list for transportation purposes. Railroads transporting the substances on Maine's list must register with Maine and pay transportation taxes. Congress never intended for the §302 and §313 lists to be used for these purposes. Maine's use of a fixed facilities list of hazardous substances for transportation purposes is a critical reason why Maine's registration and fee requirements are inconsistent under §112 of the HMTA. See AAR's October 20 comments, pp. 2-4.

Maine takes issue with AAR's position that Maine's tax is unreasonably high. Maine endorses the comments of Yellow Freight on this issue. Maine's Nov. 30 comments, p. 5. We have already shown the fallacy in Yellow Freight's argument. Maine also states:

> AAR says. . .Maine provides no services regarding hazardous materials transported by rail. But, there is not one iota of evidence in the record to substantiate the AAR position . To the contrary, the Department asserts that its response teams do, on numerous occasions, respond to hazardous materials problems arising through rail transportation. Furthermore, the need for the states to assist the federal government in overseeing the transportation of hazardous materials by rail has been recognized by the General Accounting Office....

Maine's Nov. 30 comments, p. 5. What the AAR actually said is that states, including Maine, play no role in enforcing railroad hazardous materials regulations since the enforcement of railroad hazardous materials laws is solely a federal responsibility. See AAR's Oct. 20 comments, p. 5. (Maine included with its comments a rewspaper article discussing whether states should have an enforcement role, but under current law, there is no enforcement role for Maine.) Insofar as emergency response is concerned, FRA accident statistics for Maine show that in the five-year period 1984-1988, there was a release from a rail car containing hazardous materials once in 1984 and once in 1985, and not at all in the 1986-1988 time period (hazardous materials incidents not meeting FRA's reporting threshold would not require significant state expenditures). In addition, these accident statistics indicate that in the 1984-1988 time period, an evacuation was required once, of seventy-five people in 1984. Maine cannot support the raising of the substantial sums of money at issue here on the basis that significant expenditures are required to respond to railroad accidents. It is revealing that in making the bold assertion that Maine's "response teams do, on numerous occasions, respond to hazardous materials problems arising through rail transportation," Maine did not cite any examples even though it was responding to AAR's showing of a lack of a need for significant state expenditures on responses to railroad hazardous materials incidents. See Maine's Nov. 30 comments at 4.

Thus, we repeat what we stated in our previous comments about the appropriateness of Maine's hazardous materials tax for railroads. Maine does not spend money on enforcing railroad hazardous materials regulations. Statistics indicate that Maine also does not spend substantial sums responding to railroad hazardous materials emergencies. Maine cannot justify imposing substantial hazardous materials taxes on railroads on the basis that Maine is collecting what it costs Maine to provide hazardous materials services to railroads. Maine's hazardous materials tax on railroads is unreasonably high. See AAR's Oct. 20 comments, p. 5.

Conclusion

The AAR's earlier comments demonstrated why Maine's registration and fee requirements for railroads are inconsistent with federal law under §112 of the HMTA. Other comments submitted in this proceeding do not demonstrate to the contrary, despite Maine's having had an opportunity to review the AAR's comments prior to the submission of its own. It is clear that RSPA has no choice but to rule that Maine's registration and fee requirements for railroads are inconsistent.

Respectfully submitted,

Michael J. Rush

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CERTIFICATE OF SERVICE

I hereby certify that copies of this comment have been sent to Mr. Beasant and Mr. Hinkley at the addresses specified in the Federal Register.

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January 5, 1990